U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk, Suite 204
Newport News, VA 23606

(757) 591-5140 (TEL)
(757) 591-5150 (FAX)

Issue Date: 05 May 2004

Case No.: 2002-LHC-2228

OWCP No.: 5-92664

In the matter of:

MICHAEL D. WEATHERINGTON,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer/ Self-Insured,

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS.
Party-In-Interest.

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* Michael D. Weatherington ("Claimant") sought compensation for an injury sustained while in the course of employment at Newport News Shipbuilding and Dry Dock Company ("Employer").

A hearing was heard on the above matter on November 5, 2003 in Newport News, Virginia. Counsel for the Claimant offered 28 exhibits, and counsel for the Employer offered 78 exhibits into the record.[1]

[1]The following abbreviations will be used as citations to the record:
CX–Claimant's Exhibits;
EX–Employer's Exhibits;
Tr.–Hearing Transcript with ALJ.

I. Stipulations

The parties submitted the following signed stipulations:

1. That an employer/employee relationship existed at all relevant times;

2. That the parties are subject to the jurisdiction of the Longshore & Harbor Workers' Compensation Act;

3. That the claimant suffered an injury to his low back having occurred on 6/13/94 arising out of the course of his employment;

4. That a timely notice of injury was given by the employee to the employer;

5. That a timely claim for compensation was filed by the employee;

6. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

7. That the claimant's average weekly wage at the time of his injury was $842.02 resulting in a compensation rate of $561.35;

8. The claimant's treating physician for his injury is Dr. Mathews;

9. The claimant has been paid and was entitled to temporary and total disability for the following dates: July 11, 1994 to July 12, 1994; July 15, 1994 to July 31, 1994; August 1, 1994 to January 10, 1995; April 6, 1995 to April 9, 1995; April 19, 1995 to June 19, 2002.

II. Issue

Whether Claimant is temporarily totally disabled or temporarily partially disabled from June 20, 2002 and continuing.

III. Facts

Michael D. Weatherington (hereinafter, "Claimant"), a forty-five year old former welder at Newport News Shipbuilding and Dry Dock Company (hereinafter, "Employer"), was injured on June 13, 1994. Claimant is a high school graduate who had been working for Employer since 1977. Claimant testified that he was welding in a confined space on an aircraft carrier when his back began hurting. Claimant testified

> I was in there cramped for awhile, and when I got out, I felt something pulling my back, like, a sharp stabbing pain, something like that. So I thought I pulled a muscle at the time, because working shipyard and stuff, you always get pulled muscles and stuff. (Tr. 23). Claimant testified that he was first treated by Dr. Richard B. McAdams. (Tr. 23). Claimant testified that he later changed physicians and began to be treated by Dr. James Schwartz, an orthopedic surgeon. He stated that he changed physicians because Dr. McAdams encouraged Claimant to exercise, which made his condition worsen. Dr. Schwartz noted that Claimant complained that his condition was getting steadily worse, and recommended that Claimant wear a brace and start physical therapy. (CX-2-25).

Claimant's condition improved with the use of a brace and anti-infammatories, but then Claimant again started complaining of a sharp, stabbing back pain when he breathed or extended his back. (CX-2-24). Dr. Schwartz referred Claimant to Dr. Hallett Mathews, a neurosurgeon, for a second opinion. Dr. Mathews met with Claimant on August 2, 1995 and recommended decompressive surgery and a lumbar fusion. Dr. Schwartz performed total laminesctomies at L4-5 and L5-S1 on September 1, 1995. He also fused Claimant's spine from Ll4 to the sacrum.

After the surgery, Claimant began physical therapy, and there was some improvement with his discomfort. (CX-2-11). Claimant complained of soreness in his calves and numbness in his left foot. Dr. Schwartz continued to recommend physical therapy. On September 16, 1996, Dr. Schwartz recommended that Claimant undergo a functional capacity evaluation. (CX-2-8).

A functional capacity evaluation was performed on September 26, 1996. The evaluator determined that Claimant was capable of light physically demanding work. Dr. Schwartz also agreed that it was reasonable for Claimant to look for work within those parameters. (CX-2-7). Dr. Schwartz also recommended a work hardening program, which Claimant began on November 19, 1996.

On January 29, 1997, Claimant again met with Dr. Schwartz and complained of stabbing pain in his buttocks and a tingling sensation in both legs. (CX-2-4). A lumbar myelogram was performed on February 4, 1997. It was interpreted as showing lumbar disk narrowing. (EX-18-19). Dr. Schwartz referred Claimant back to Dr. Mathews for an opinion.

Dr. Mathews saw Claimant on March 5, 1997. Dr. Mathews opined that Claimant had a non-union of the prior fusion, and he recommended reconstructive surgery, including the emplacement of dynalock hardware. Dr. Mathews performed the surgery on April 28, 1997. (EX-36 at 4; EX-21). On May 12, 1997, Dr. Mathews reported that Claimant was improving, but should avoid bending, lifting, sitting or twisting. (EX-36 at 4). Following this surgery, Claimant continued with physical therapy. On September 18, 1997, Claimant reported to Dr. Mathews that he was experiencing some discomfort in his back, including radiating pain down his legs.

Over the next several years, Claimant continued to be treated by Dr. Mathews. On January 26, 1998, Dr. Mathews reported

> Michael is seen for evaluation of his spine. He continues to have good and bad days. He is not convinced he is actually improving. Neurologically he is intact. He has some back and leg symptoms. […] He is still at 7 months from surgery and hopefully he will fuse this. If he is not better on his two month return we will consider performing a myelo CT study. The do's and don'ts were described. He may need additional diagnostic tests to evaluate his fusion.

(EX-36 at 6). On March 23, 1998, Dr. Mathews again met with Claimant. Dr. Mathews noted that the Claimant continued to experience problems eleven months after surgery, and he noted that the Claimant was concerned about nonunion. (EX-36 at 7). On May 18, 1998, Dr. Mathews again met with Claimant and reported

> Essentially he does not have good fusion mass posteriorly. He had two previous surgeries prior to his instrumented fusion. He is going to need some anterior column support.
>
> With the anterior column being virgin without previous surgery and with the spondylolisthesis as noted, I think it is wise that we proceed forth with anterior interbody fusion. Bone grafting with interferant screws would be suggested as the most cost effective way to do this. We will ask general surgery to help us with the anterior retroperitoneal approach.

(EX-36 at 8). Dr. Mathews performed surgery on Claimant on July 6, 1998. (EX-26). Following the surgery, Dr. Matthews reported that Claimant was healing well, however, Claimant still complained of some discomfort, which Dr. Mathews noted would improve as Claimant healed. (EX-36 at 9).

Claimant was referred to a Job Club in August 12, 1999. (EX-48). The Job Club facilitator, Ms. Denise Barnhart, indicated that Claimant did not attend any of the meetings. (EX-48). Ms. Barnhart performed a labor market survey on December 17, 1999, and based her conclusions on file information. (EX-49). Ms. Barnhart identified Claimant's work restrictions to be limited to sedentary jobs, and she identified a total of 12 positions that she felt were within Claimant's restrictions. (EX-49).

On November 1, 1999, Dr. Mathews reported

> Mr. Weatherington is seen today for evaluation of his spine. He continues to have a lot of symptoms. He gets numbness and tingling with a lot of activity. He is here today for evaluation.
>
> Neurologically, he is about the same. He gets some tingling with excessive overuse and activity. This is most likely from scar and previous posterior surgery. His fusion looks excellent. He is getting solid arthrodesis. I would hope that he would be a candidate for some sedentary activity on January 1, 2000. That is my goal at this stage. I do not think that we are planning on any additional treatment for him. I do not think that we need to do any diagnostic

> imaging at this stage, but of course we will have to see how he does in the near future. Do's and don'ts were discussed. Follow-up in three months is encouraged.

(EX-36 at 13). A week later Claimant again visited Dr. Mathews complaining of pain. Dr. Mathews recommended pain management and referred Claimant to Dr. Tushar Gajjar for treatment. (EX-36 at 14).

Dr. Gajjar met with Claimant on November 30, 1999. He noted that Claimant complained of numbness and occasional sharp pains in his lower extremities, and that he also experienced increased pain when walking, lifting, sitting or standing. Dr. Gajjar's treatment included caudal epidural steroid injections under fluoroscopic guidance. (EX-42). Claimant underwent a steroid injection on January 11, 2000. (EX-42 at 6). Following this treatment, Claimant continued to complain of pain and pressure in his lower extremities. (EX-42).

A Functional Capacity Evaluation was performed on October 23, 2000. (EX-41). The report states that Claimant is capable of performing light physically demanding work including some handling up to 25 pounds and frequent handling of only 15 pounds. The report further stated

> He was unable to bend to floor level, and therefore should be restricted in performing any functional activities in a stooped or bent position. Standing tolerance is limited to a frequent basis provided frequent changes throughout the day are allowed. Sitting is also to frequent levels, but frequent changes of position are recommended also.

(EX-41). The evaluation noted that Claimant stated that he would be unable to tolerate a full day of work on an ongoing basis due to back pain; therefore, recommended work was to be limited to part-time initially. (EX-41). The evaluation also determined that Claimant should avoid climbing vertical and inclined ladders, crawling, kneeling, squatting, bending and twisting, as well as the use of a vibratory tool and foot controls. It was determined that Claimant could stand frequently (2.5-5.0 hours). There were no restrictions set on Claimant's ability to push or pull with his hands or arms or grasping with his hands. (EX-41).

On November 30, 2000, Claimant again met with Dr. Mathews. Dr. Mathews reported that Claimant was continuing to complain of symptoms, and was continuing treatment with Dr. Gajjar to control his pain. Dr. Mathews also noted that Claimant was taking Methadone, and was therefore not alert enough to do perform telemarketing positions. He stated

> I would like to make him completely out of work at this stage. I feel he is going to be headed for future surgical intervention at the level proximal to his old surgical level. That is going to come first and I don't see returning to work at this stage being productive, predictable or safe for him.

(EX-36 at 20).

On July 19, 2001, Claimant again met with Dr. Mathews. Dr. Mathews reported

> He continues to have a lot of cervical and lumbar symptoms. He is getting a lot of radicular symptoms in his arms. He is dropping things in his hands and he is not able to continue going the way he is going.
>
> Dr. Gajjar has asked that we re-evaluate him. Think new imaging is important because the cervical spine is in play, he is having intense weakness in his arms and also, his lumbar spine is not improving. Arachnoiditis is a certain diagnosis that could certainly affect his cervical spine and his lumbar spine and these concepts need to be documented and also assessed to make sure no additional pathology is noted. Plan: Cervical and lumbar MRI study.

(EX-36 at 21). MRIs of the lumbar and cervical regions were performed on August 30, 2001. The conclusions of the lumbar MRI state

1. Post operative changes including posterior fixation with rods and pedicle screws from L3-L5. An interbody cage prosthesis is also present at the L3/4 disc space. Laminectomies at L3-L5.

2. Grade I spondylolisthesis L4 on L5 with moderate to severe disc degeneration.

3. No focal disc protrusion demonstrated and no evidence for canal stenosis.

(EX-29). The MRI of the cervical spine revealed "moderate broad right posterolateral disc protrusion C5/6 with neural foraminal narrowing." (EX-29).

Dr. Mathews met with Claimant on September 6, 2001 to again evaluate his spine. (EX-36). After reviewing the MRI results, Dr. Mathews reported

> The studies show he has documented stenosis on his myelo CT study. His MRI shows none of that and I suspect this is a loading problem, that when he loads his spine, he gets tight as his ligamentum flavum buckles and his disc gets insufficient at L2-L3. On MRI studies, however, he has no central or lateral recess stenosis.

(EX-36). On February 28, 2002, Dr. Mathews noted that Claimant's symptoms were worsening in both his cervical and lumbar spine. Dr. Mathews reported that Claimant was suffering from more numbness and weakness in his legs. (EX-36 at 23). Dr. Mathews also noted

> No one is looking for any more surgery but his spine continues to worsen and he is going to be faced with this procedure as a maintenance to maintain current amiculatory function. Unfortunately the disease is worsening.

(EX-36 at 23). On May 17, 2002 Claimant was enrolled in vocational training and was scheduled to begin Job Club on May 28, 2002. (EX-53). Claimant attended three out of the four

sessions during the first week. (EX-50). Claimant's reading level was assessed to be at the 8th grade level, and his spelling level was assessed to be at a 3rd grade level. His math abilities were assessed to be at a 7th grade level. (EX-50). On May 28, 2002, a note was faxed from Dr. Mathews to the Job Club administrator stating that Claimant was unable to attend the Job Club Analysis. The facsimile stated "the driving and the prolonged sitting have aggravated his condition. He will be reevaluated in the office on 6-13-02." (EX-55). At a deposition on October 4, 2002, Claimant stated that he was experiencing pain driving to and from the Job Club. Claimant stated that although Job Club entailed mainly sitting or standing, he still experienced pain both at the class and during the hour and a half drive. He stated,

> It would be one thing if it was one day a month or something like that, but it's a continuous day after day that my back just can't take the driving, the medication I'm on, I just couldn't take the pain sitting in class.

(EX-63 at 22).

On June 13, 2002, Dr. Mathews indicated that Claimant's symptoms were persisting. He stated,

> His job core activities lead to total dysfunction. He is unable to go four hours a day. He had to be caught and picked up on several occasions because of the intense pain in his back.
>
> At this stage, he cannot function at minimal sedentary activity and we will continue to support 100% permanent total disability. He also has had cervical and lumbar issues which continue to evolve and he is not done with intervention with regard to his advancing disease. This process will continue to be monitored and he will follow-up in three months. Notes are written for the concept of not continuing any job search at this stage.

(EX-36 at 24).

On July 30, 2002, Claimant underwent an independent medical evaluation by Dr. Jeffrey R. Carlson, an orthopaedic surgeon. Dr. Carlson evaluated Claimant, and opined

> Mr. Weatherington has now had four operations in the lumbar spine without any improvement in his back or leg pain. He is planning to possibly have a fifth operation on his spine to improve the pain in his back. At this point, I cannot suggest another operation would be helpful to him, as continuing to extend his fusion mass will probably not improve any of his back pain or his leg pain. I would suggest that a pain specialist would be the best option for treatment of his pain in the long term. I do believe Mr. Weatherington is employable as opposed to when he was taken out of work because of his cognitive state on the medications. He is currently quite able to answer questions and discuss his clinical situation, and he would be able to perform at a sedentary duty. I would

> not suggest that his back is well enough to be performing at anything strenuous, and sedentary light duty would be a reasonable expectation for him.

(EX-58). On October 29, 2002, Dr. Carlson clarified his position regarding Claimant's abilities to drive to and from work, and stated that in his opinion, Claimant would be able to drive as long as he needed if he were to take rests while driving. (EX-60). On August 1, 2002, Dr. Mathews again met with Claimant, and indicated that he continued to have pain in his neck and spine. Dr. Mathews noted that his MRI revealed that he suffers from a C5-C6 disk collapse and disk herniation at that level. Dr. Mathews further stated,

> He is miserable with this and wants to get his headache, arm, neck and shoulder symptoms resolved before he sees really what kind of pain burden he is carrying from his lumbar spine. […] He is not a clear cut situation. He has tandom disease of cervical and lumbar pathology, ongoing at the same time. He still has ligamentum flavum stenosis and hypertrophy at L2-L3 which I understand people are not necessarily giving him credit for and are ignoring on pictures including flexion/extention and Myelo CT studies.

(EX-59).

On August 9, 2002, an update was completed on Claimant's vocational assessment by Mr. Williams Kay, a vocational case manager. Claimant indicated that he was not looking for a job and was expecting to get more surgery. In addition, Claimant stated he was taking medication for hypertension, pain, as well as muscle relaxants, and that as a result of the medications he was prone to dizzy spells and the inability to concentrate. Mr. Kay also noted that Claimant's last rehabilitation experience was when he attended Job Club in May 2002.

Claimant was also referred by the OWCP to Dr. David Goss, another orthopaedic surgeon. (EX-62). Dr. Goss concluded in a report dates November 25, 2002 that Claimant was not capable of working based on Claimant's pain. In addition, Dr. Goss opined that Claimant's driving should be limited to driving distances of 15-30 minutes. (CX-11-2).

In April 2003, Employer retained investigators to conduct surveillance of the Claimant. The video surveillance portrayed three days of activity, and showed Claimant driving, bending to check the air levels in the tires of his automobile, lifting six individual pieces of 2 x 4 lumber, and slowly walking and shopping with his wife. The video also showed Claimant bending to remove items from his cart, as well as entering and exiting his automobile with little effort. Employer argues, "The Claimant was able to go wherever and do whatever he wished, without any manifestation of pain," and later noted that the surveillance video revealed that Claimant was "extremely active." (Employer's Brief, p. 8).

The surveillance tape submitted into evidence by Employer shows Claimant outside of his house on several occasion over several days. On the 17th of April, the surveillance tape revealed Claimant drinking coffee at 7-Eleven in the morning. Claimant then went to an appointment at Dr. Carlson's office. Claimant and his wife then went to two discount stores and then went grocery shopping.

On May 8, 2003 Dr. Mathews again met with Claimant. He reported that Claimant continued to suffer from symptoms, including "weakness, numbness, and tingling in his hands and spinal radiculopathy consistent with C5-C6 and C6-C7 continue to be noted." (EX-72). Dr. Mathews further noted that Claimant was miserable, and that "there was really nothing else to offer him with his cervical radicular symptoms," and he suggested surgical intervention. (EX-72). In addition, Dr. Mathews stated, "This gentleman has had a very difficult posterior lumbar course and course tandem disease in the cervical and lumbar spine is a problem which is definitely noted in people of heavy manual labor with diffuse and generalized degenerative disease." (EX-72).

Claimant testified at the hearing on November 5, 2003. He stated that he spends most of his free time at home walking or laying on his recliner to relieve the pressure off of his back. (Tr. 45). He testified that since he left the Shipyard, he has not looked for a new job because he feels he cannot work because he is in too much pain. Claimant also testified that he never gets a full night's sleep because he wakes up in pain throughout the night. (Tr. 29). He also stated that he would not be able to work because of the medication he was on. He stated

> I just can't concentrate. When you take this Percocet, it's hard to concentrate. I mean I can't even read a newspaper without skipping. I'll start reading an article and the next thing you know, I'm over here and I can't remember what I read before that.

(Tr. 48). Claimant also testified that he usually allows his wife to drive, and that he makes an effort not to drive his automobile much anymore. (Tr. 45). He also stated that he accompanies his wife on shopping trips to walk and get exercise, but that he frequently has to rest and sit down while his wife is shopping. When asked if he would be able to hold a job where he could sit in a comfortable chair, he stated,

> If I can stand the pain, I guess so. Like I said, you know, pain plays a big part in the lower back. It doesn't just hurt your lower back, it hurts all the disks in the body.

(Tr. 53). In addition, Claimant stated that he frequently accompanies his wife to Wal-Mart and other stores to walk and get exercise. He testified

> The reason I go to Wal-Mart is to exercise. It may sound stupid. You've got baskets there you can use as a walker. I mean I can lean on a basket. They've got benches everywhere. That's where I try to get my exercise. They don't show none of that in Wal-Mart. They don't show me sitting on the benches.

(Tr. 37).

Employer provided the surveillance tapes to Drs. Goss and Carlson for review. Dr. Carlson stated,

> After review of this videotape, it would appear that Mr. Weatherington has significantly improved since my Independent Medical Evaluation concerning his lower back done July 30, 2002, in that at some point his range of motion was quite limited to only about 45 degress of flexion. Throughout the videotape, there are multiple times when he is bending 80 degrees or greater without any evidence of pain. I think he would be able to do at least moderate duty concerning lifting, carrying, and bending as opposed to the sedentary duty that we had established for him. He would most likely be able to bend and lift at least the weight of 2 x 4's multiple times. Concerning his driving abilities, as was stated in our note of 10/29/02, there certainly would not be any limit to his driving ability assuming he was able to take rest breaks.

(EX-74). Dr. Goss also reviewed the videotape and stated in a letter to Employer's counsel,

> I am in receipt of a videotape of Mr. Weatherington, which shows him performing multiple chores, physically, i.e. putting air in tires, lifting objects, flexing and extending his lower back, lifting, carrying bending, etc. It appears that he has significant improvement in his condition, compared to my evaluation of him November 25, 2002.
>
> Based on these findings, I would recommend that he be placed in at least moderate duty category, which would allow him to lift medium weights in the 10-30 pound range multiple times a day. Certainly sedentary duty would be appropriate and on the basis of these surveillance tapes, in fact, I believe he could do more than that, i.e. moderate duty.
>
> In addition, it appears that because of this improvement I see no reason to restrict his driving distances. He should be able to drive at least one hour to and from work. Indeed, I see no reason to restrict his driving at all, based on these tapes.

(EX-78).

Dr. Mathews, Claimant's physician, also reviewed the surveillance videotape. (EX-77). In a letter to Mr. Camden dated August 21, 2003, Dr. Mathews stated

> We have seen Mr. Weatherington for multiple problems in his cervical and lumbar spine. We have been following him for a workman's compensation injury of his lumbar spine which is so documented in his chart. He continues to have problems at adjacent level disease proximal to this previous intervention. This is something that continues to evolve and also continues to worsen in this observation. He continues to fail with conservative care management of that process.
>
> We have been notified and have discussed directly with Mr. Weatherington some videos that have him loading some 2 x 4's into the back of

his vehicle. These videos represent a best case scenario of him at his best functioning capability. This however, is an intermittent and focused look at a few minutes of activity which does not represent an 8 hour day—40 hour work week. His capability of performing that is very limited and his ability to sit, commute and perform activities of daily living during and 8 hour day is not predictable because of medication, because of pain, and because of lack of endurance.

We would also consider and render him 100% disabled with regard to his multiple spine surgeries which have left him unable to predictably work in anything more than an absolute modified sedentary position. That is a possibility if his current lumbar condition resolves somewhat. The combination of medicines, physical disability, and the overall psychological effect of his current disease process making [sic] him an ineffective employee and not capable of performing light to sedentary activities.

(EX-77). Dr. Mathews added that Claimant's cervical spine condition was a degenerative condition and was in no way related to Claimant's injury nine years earlier. (EX-77).

Dr. Carlson originally opined that Claimant would be able to drive an hour and-a-half each way. (EX-6). However, Dr. Carlson's opinion changed after viewing the surveillance videotape, and he reported that Claimant should have no restrictions on his driving. (EX-74). Dr. Goss also believed that Claimant should have no restrictions on his driving. (EX-78).

Mr. Kay performed a labor market survey on August 9, 2002, and then he updated his report on July 11, 2003 and September 16, 2003. Prior to the supplemental labor market surveys, Mr. Kay met with Claimant and performed an assessment and testing to update his report. (Tr. 83, EX-70, EX-75, EX-76). Mr. Kay also updated his report based on additional medical reports provided by Drs. Goss and Carlson. (Tr. 83).

Mr. Kay administered the WonderLit Standard Test, which provides a verbal and math quantitative composite. Mr. Kay indicated that there were several positions that would be appropriate for Claimant, based on the restrictions set by Dr. Carlson and Dr. Goss. He stated that Dr. Mathews

has been pretty consistent with saying he can't work. So if we were to use the restrictions in Dr. Mathews' report, that would be my conclusion that he was probably not able to work based on his [reports].

But the other doctors that have seen him and was asked in those in the reports [sic] in relation to the jobs I found and then I put it in my report also.

At the time I did the labor-market survey, sedentary was considered to be probably the level he could work. That was based on Dr. Carlson's medical report.

(Tr. 87). Mr. Kay indicated four possible types of positions that would be suitable for Claimant and that all the positions listed in the original labor market survey were sedentary, i.e., minimal lifting and the freedom to change positions when necessary. (Tr. 88). In the Labor Markey Survey, the positions listed were those of customer service, unarmed security, dispatcher, and cashier. (EX-70).

Mr. Kay identified two positions in the customer service industry that he says were hiring continuously. The first position Mr. Kay identified was with Expediter Corporation, located in Pittsburgh, Pennsylvania. The labor market survey states that the position is for a "surveyor" and can be full or part time and is performed at home. The position pays $9.00 an hour. Mr. Kay did not include a detailed description of what type of physical demands this position would require in the labor market survey. At the hearing, Mr. Kay testified that this position was

> An on-the-job type training type position…The Shipyard would be involved in it. They would have to pay a certain amount each month in order for him to do it during the training period.
>
> The idea being that after a certain period of time, that he would learn the skills and he'd be able to do it well-enough he can receive a salary. And, it's not supplemented anywhere.

(Tr.89). Mr. Kay specified that the Expediter Corporation job was an "on-the-job training assistant employment." He testified that he did not know whether there were any instances in which the employee successfully completed training and was paid entirely by the employer. (Tr. 89-90). The job analysis for Expediter Corporation stated that Claimant could stand, walk and sit as desired the entire day. The job analysis also stated that a person with this position "will be responsible for making business to business and consumer survey calls via telephone using provided customer lists to correct or change information on the list and determine purchasing authorization. (EX-70). On cross examination, Mr. Kay admitted that Expediter was located in Pittsburgh, Pennsylvania, and that they are not the actual employer. (Tr. 116-17). Mr. Kay testified that Expediter would refer Claimant to another company for employment, and much of the work involves calling businesses for information. Mr. Kay also noted that he did not know where or to what type of company Expediter would refer Claimant. (Tr. 120).

The second position listed as a customer service position was with Goodwill Industries, in Newport News, Virginia. The position was described in the labor market survey as a "donation center attendant," and pays $5.15 per hour. Mr. Kay testified that the position entailed giving receipts to people giving donations. Usually the position is set up in a parking lot to accept donations. Mr. Kay testified that he has placed another woman with back pain with Goodwill, and she was accommodated with a chair to avoid any discomfort. (Tr. 91). The job analysis indicates that 7 hours of an 8 hour day would be spent sitting, less than two hours would be spent working with arms extended at shoulder level, and a half hour could be spent standing or sitting, as needed. (EX-70). Lifting objects would be limited to 20 pounds, but Claimant's needs could be accommodated. (Tr. 124). However, on cross-examination, Mr. Kay admitted that Goodwill Industry's former manager accommodated persons to make the position sedentary, but that he did not know if the current manager would do the same. (Tr. 127). Mr. Kay also

indicated that the position at Goodwill Industries usually starts as a part-time position, but could possibly become full-time. (Tr. 125).

Mr. Kay also identified two positions as an unarmed security guard that he indicated were sedentary and that Claimant would be capable of performing. (EX-70). The first prospective employer was with Security Services of America in Newport News as an unarmed security guard paying $6.00 per hour, and the second was with James York Security in Williamsburg, paying $6.00 per hour. Of these positions, Mr. Kay testified,

> They are easier sites as far as being sedentary work or not having to be involved with a lot of the back-and-forth directing people. Things like parking lot jobs. Gate guard jobs, where they just let people into the area.
>
> Also, the only one I used in my labor-market survey was the hotel monitoring position, where you simply sit at a hotel hallway and monitor the hallway. It's done with school groups, that type of thing.
>
> The guard is told to not go and intervene with these people, and go get the chaperone or the teacher, whoever is in charge of the group and let them handle these kinds of incidents.

(Tr. 92). The job analysis for Security Services of America notes that Claimant may start part time, and also indicates that the majority of the position would be spent sitting, although Claimant could also alternate between walking and standing. (EX-70, Tr. 127). The position for James York Security also allows Claimant to start part time or as medically restricted, and requires sitting most of the shift, although Claimant could also alternate between walking and standing. (EX-70). Lifting would be limited to 5 pounds for both positions. (EX-70).

The third position that Mr. Kay found to be suitable for Claimant was that of a dispatcher. (EX-70). The two positions Mr. Kay noted that had available openings were a position as dispatcher with Associated Cabs in Newport News, Virginia, for $6.00 per hour, and a position with Digital Security in Hampton, Virginia, as an alarm dispatcher paying $5.15 per hour. Mr. Kay testified that the position at Associated Cabs consisted of sitting at a desk most of the time, where necessary items such as the phone, maps, and two-way radio are very close at hand. In addition, Mr. Kay noted that this position would not require computer skills, as all of the records are taken by hand. (Tr. 92). The job analysis notes that Claimant would be sitting for 8 hours a day, although standing and walking would be allowed if desired, and part time work is available as well. (EX-70). Lifting would be limited to 3 pounds. (EX-70). The position at Digital Security would allow sitting for 8 hours, with standing as needed, and would not include any lifting. The Digital Security position was available for no less than 30 hours of work. (EX-70, Tr. 133). At the hearing, Mr. Kay stated that the Digital Security position may not be suitable for Claimant given the fact that he has limited computer skills and the position requires some computer proficiency. (Tr. 97-98).

The fourth type of position that Mr. Kay testified would be suitable for Claimant was that of cashier. In the Labor Market Survey, Mr. Kay identified two prospective employers who were

hiring at the time of the survey. The first opening was with Express Car Wash in Hampton, Virginia, paying $6.00 per hour. The second opening was with Allright Auto Parks Inc., in Newport News, Virginia for $7.00 per hour. Mr. Kay testified

> Cashier positions would be suitable primarily because some placed they will let you sit while doing this. This is sedentary. I've identified places. For example, at the car wash, the cashier is sitting at a desk. They can get up, stand up and move around, but basically it's sitting at a desk.
>
> At car type places, parking lots and stuff like that. People come up to a booth. The person normally sits in the booth. There is some walking associated with that. Sometimes they have to go patrol an area or keep an area clean. But they do not have to do that but for a very short period of time. Their primary duty is sitting in a booth and taking in money from the people driving by.

(Tr. 93). The job analysis for Express Car Wash indicates that Claimant would be sitting most of the shift, although walking and standing would be allowed as needed. Lifting would be generally less than 10 pounds. Mr. Kay testified that the Express Car Wash position would be full-time. (Tr. 133). Mr. Kay also noted that that the position was also require some stocking of food item shelves, as well as dusting and straightening of these items. Mr. Kay also noted that these items are not at ground level. (Tr. 134).

The job analysis for Allright Auto Parks Inc. requires up to one hour of walking, and allows sitting or standing as needed. There would be lifting involved in the position. (EX-70). Mr. Kay also noted that depending on the location where an individual was hired, the position would be full or part-time.

Mr. Kay testified that the positions identified in the original Labor Markey Survey were available between June and August of 2002. The survey indicated that with these jobs, Claimant's maximum potential wage was $9.00 per hour, or $270.00 per week, and his average wage earning potential is $6.00 per hour, or $180.00 per week. Mr. Kay testified that all of these positions were also generally an hour's drive from Claimant's zip code in Matthews, Virginia. (Tr. 101).

Since the time of the original Labor Markey Survey, Mr. Kay updated the availability of these positions and submitted an additional report on July 11, 2003. In addition, Mr. Kay took under consideration Dr. Carlson's recommendation that Claimant would be able to secure a moderate duty position concerning lifting, carrying and bending. (Ex-75). Medium work, as defined by The Classification of Jobs (5^{th} Edition), involves "exerting 20 to 50 lbs. of force occasionally, and 10 to 25 pounds of force frequently, and/or negligible up to 10 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Light Work." (Ex-75).

Mr. Kay noted in his July 11, 2003 report that Expediter was still hiring. Goodwill, which was hiring when contacted on September 2002, October 2002, February 2003 and April 2003 was not hiring at the time of the report. Security Service of America, which Mr. Kay had

placed client with on December 2002 and March 2003, was not currently hiring. James York Security, which historically hires 30 persons a year, was taking applications when contacted. Associated Cabs, which was hiring in December 2002, January 2003 and March 2003 was currently taking applications. Digital Security, which historically hires three persons a year, was currently taking applications. Express Car Wash, which historically is available by history, was accepting applications. Allright Auto Parks, which historically hires three to four persons a year by history, was not hiring when contacted. (EX-75).

In the July 11, 2003 report, Mr. Kay also indicated that he contacted additional potential employers. (EX-75). Mr. Kay based these additional positions on Claimant's experience, vocational qualifications, education, and physical capabilities as described by Dr. Carlson which state that Claimant could perform a moderate duty position. (EX-75). These available positions included a sales associate position at 7-Eleven for $6.50 per hour, a cashier at Wal-Mart for $6.25 per hour, a position as a counter helper at Advance Auto for $6.00+ per hour, and inside help at Pizza Hut for $5.50+ per hour. Pizza Hut was also hiring for driver positions. In addition, Mr. Kay indicated that a position as a Night Turndown for the Colonial Williamsburg Foundation for $8.38 per hour was also available. The job analyses for each of these jobs note that standing would be necessary for at least 4 hours, and up to eight hours. (EX-75). All of the positions except for the position at the Williamsburg Lodge were between 35 to 40 hours. The position at the Williamsburg Lodge was for 20+ hours and is a seasonal position. (EX-75). The position at 7-Eleven requires lifting up to 39 lbs. and the use of a cash register. The position at Wal-Mart would involve cash/credit transactions, and would require the lifting of 10-15 lbs. maximum. The position at Advance Auto parts would involve looking up parts on a computer as well as using a cash register, and would require lifting up to 20 lbs. The position at Pizza Hut would also require the use of a cash register, and may involve cooking and cleaning. Lifting would be less than 10 lbs. (EX-75).

Mr. Kay again updated the original Labor Market Survey on September 16, 2003. (EX-76, Tr. 95). Mr. Kay again updated the availability of the sedentary positions that Mr. Kay had identified in the first labor market survey. Mr. Kay testified that he recontacted the employers and checked to see if they were hiring at the time. (Tr. 96). Mr. Kay also referenced Dr. Carlson's June 13, 2003 report, which noted that it appeared that Claimant's condition had greatly improved and that Claimant would be able to do at least moderate duty concerning lifting, carrying and bending. (EX-76). Mr. Kay also noted Dr. Matthews' correspondence, in which he stated, "the combination of medicines, physical disability, and overall psychological effect of his current disease process making [sic] him an ineffective employee and not capable of performing light to sedentary activities." (EX-76).

Mr. Kay noted that given the restrictions set by Dr. Matthews, Claimant would be able to physically manage working at the following positions: Expediter, Donation Center Attendant, both security positions, both dispatcher positions, as well as a greeter at Wal-Mart. Mr. Kay testified that based on Dr. Matthews' description of Claimant's physical capabilities, the positions that are best suited for Claimant are with Goodwill Industries, the security positions, the Associated cab position, as well as the Expediter position. (Tr. 97). He also testified that all the positions listed in the labor market survey would be appropriate given Dr. Carlson's restrictions of moderate duty work. (Tr. 98). Mr. Kay noted that the following positions were

hiring when contacted in September 16, 2003: Expediter, Goodwill, Security Services of America, James York Security, Digital Security, Express Car Wash, 7-Eleven, Gloucester Wal-Mart in the layaway department, Advance Auto in Gloucester, and Gloucester Pizza Hut.

IV. Analysis

A. The Nature and Extent of Claimant's Disability

The burden of proving the nature and extent of disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as"incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity.

(1) Nature of Claimant's Disability

Neither party has asserted that the nature of Claimant's injuries have reached permanency. In addition, at the time of the hearing, Claimant was scheduling another surgery to alleviate his pain. The Board has held that where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. Kuhn v. Associated Press, 16 BRBS 46, 48 (1983). The Board has further held that where a claimant undergoes surgery, his condition is permanent only after recovery from surgery. Walker v. National Steel & Shipbuilding Co., 8 BRBS 525, 528 (1978); Edwards v. Zapata Offshore Co., 5 BRBS 429, 432 (1977).

(2) Extent of Claimant's Disability

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1986); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, Claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliot v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988). In determining the extent of a claimant's disability, the judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). A claimant's credible testimony on the existence

of disability, even without objective medical evidence, may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that Claimant can perform certain types of work activity. Ruiz v. Universal Maritime Service Corp., 8 BRBS 451, 454(1978); Eller & Co. v. Golden, 620 F.2d 71 (5th Cir. 1980).

At this initial stage, Claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliot v. C & P Tel. Co., 16 BRBS 89 (1984). If the Claimant can meet this burden, then he has proven that he is totally disabled. "Usual" employment means the Claimant's regular duties at the time he was injured. The Benefits Review Board has held that a doctor's opinion that an employee's return to work would aggravate his condition could support a finding of total disability. Care v. Washington Metropolitan Area Transit Auth., 21 BRBS 248 (1988); See also Boone Newport News Shipbuilding and Dry Dock Co., 21 BRBS 1 (1988); Lobue v. Army & Air Force Exchange Service, 15 BRBS 407 (1983).

In this case, Employer has conceded that Claimant is unable to return to his former job at the Shipyard given his injuries. Because the Claimant has made this *prima facie* showing, the burden shifts to employer to show suitable alternative employment. Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988); Nguyen v. Ebbtide Fabricators, 19 BRBS 142 (1986). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989) (involving injury to a scheduled member); MacDonald v. Trailer Marine Transp. Corp., 18 BRBS 259 (1986), aff'd, (No. 86-3444) (11th Cir. 1987) (Unpublished).

Because Claimant has established a *prima facie* case of total disability, the burden shifts to employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. The ALJ must allow the employer to present evidence as to the availability of suitable alternative employment, even if the employer does not have information as to the job's previous availability. Lucas v. Louisiana Ins. Guaranty Ass'n, 28 BRBS 1 (1994). If the testimony relied upon by the judge provides substantial evidence to support his finding that post-injury work was available which constitutes suitable alternative employment, and the claimant has not presented any evidence of a reversible error, the Board will uphold the judge's evaluation of conflicting evidence and credibility. Mendoza v. Marine Personnel Co., 46 F.3d 498, 500, 29 BRBS 79, 80-81 (CRT) (5th Cir. 1995); Hawthorne v. Ingalls Shipbuilding, Inc., 28 BRBS 73 (1994), modified on other grounds on recon., 29 BRBS 103 (1995).

The Fourth Circuit has adopted this standard. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984), rev'g Tarner v. Trans-State Dredging, 13 BRBS 53 (1980); Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell], 592 F.2d 762, 765, 10 BRBS 81, 86-87 (4th Cir. 1979). The claimant does not have the burden of showing that no conceivable suitable alternate employment is available; rather, the employer must prove that suitable alternate employment exists. Shell v. Teledyne Movible Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 11 BRBS 635 (1979).

The ALJ must allow the employer to present evidence as to the availability of suitable alternative employment, even if the employer does not have information as to the job's previous availability. Lucas v. Louisiana Ins. Guaranty Ass'n, 28 BRBS 1 (1994). If the testimony relied upon by the judge provides substantial evidence to support his finding that post-injury work is available which constitutes suitable alternative employment, and the claimant has not presented any evidence of a reversible error, the Board will uphold the judge's evaluation of conflicting evidence and credibility. Mendoza v. Marine Personnel Co., 46 F.3d 498, 500, 29 BRBS 79, 80-81 (CRT) (5th Cir. 1995); Hawthorne v. Ingalls Shipbuilding, Inc., 28 BRBS 73 (1994), modified on other grounds on recon., 29 BRBS 103 (1995).

The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Armfield v. Shell Offshore, Inc., 30 BRBS 122, 123 (1996); Royce v. Elrich Constr. Co., 17 BRBS 157 (1985); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473, 480 (1978); Salzano v. American Stevedores, 2 BRBS 178 (1975), aff'd, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976); Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP, 227 F.3d 934 (7th Cir. 2000). The employer must demonstrate that specific job opportunities exist which the injured employee could perform considering the claimant's age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 99 F.2d 1374 (9th Cir. 1993); cert. denied, 511 U.S. 1031 (1994). The Edwards court also stressed the importance of these jobs being regularly available. The judge must allow the employer to present evidence as to the availability of the suitable alternative employment, even if the employer does not have information as to the job's previous availability. Lucas v. Louisiana Ins. Guaranty Ass'n, 28 BRBS 1 (1994).

Furthermore, the employer need not establish that the claimant was offered a specific job. Trans-State Dredging, 731 F.2d at 201, 16 BRBS at 75 (CRT). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988); Price v. Dravo Corp., 20 BRBS 94 (1987); Rieche v. Tracor Marine, 16 BRBS 272 (1984); Daniele v. Bromfield Corp., 11 BRBS 801 (1980). In the Fourth Circuit, employer need only show that "work [is] available to a claimant which is within that claimant's physical and educational ability, age, experience, etc. to perform and secure." New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Trans-State Dredging, 731 F.2d 199, 201 (4th Cir. 1984); Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP, 227 F.3d 934 (7th Cir. 2000). The burden then passes to the claimant to show that with "due diligence," he was unable to secure any of the employer's suitable alternative employment.

a) Claimant's Work Restrictions

Employer argues that Claimant is capable of working if he diligently looked for a job. Employer first argues that the weight of medical evidence established that Claimant is physically

capable of working. Employer argues that Drs. Goss and Carlson both have opinions that Claimant is capable of working moderate duty work. As noted above, Dr. Goss is an orthopaedic surgeon independently selected by the OWCP to examine Claimant. Initially, Dr. Goss opined that Claimant could not work because of his back pain. However, after watching the surveillance video he stated that Claimant could work "moderate duty" with no limitation on his ability to drive. Dr. Carlson first opined that Claimant could only perform sedentary or sedentary-light work, and could only drive up to 1.5 hours each way with breaks. Following a review of the surveillance video, Dr. Carlson also changed his recommendation and opined that Claimant was capable of moderate duty work with no limitations on his ability to drive.

Claimant argues that he is totally disabled, and relies on the opinion of his treating physician, Dr. Mathews. Dr. Mathews opined that Claimant was totally disabled and has been since June 20, 2002. Claimant argues that the opinion of Dr. Mathews is well-reasoned and rational, and takes into account the combination of medicines, physical disability and overall psychological effect of Claimant's disease process, all of which render Claimant an ineffective employee. Claimant also argues that his extensive medical history, which includes four back surgeries, validates Dr. Mathews' opinion. In addition, Claimant argues that the surveillance video represents only a brief period of time during Claimant's day, and therefore does not represent Claimant's abilities throughout an 8-hour day. Claimant also notes that Dr. Mathews also reviewed the video tape and made the same determination.

Employer argues that the video tape was taken on three different days and recorded Claimant's activities for more than a few minutes of activity. Employer notes that on one specific day of filming, Claimant went to 7-Eleven, Dr. Carlson's office, and shopped at Big Lots, K-Mart and Portside. Employer notes that on this occasion, Claimant was active for at least nine hours. In addition, Employer also argues that despite Claimant's assertions of pain, Claimant does not limp, grimace, or display any type of pain while lifting 2 x 4's or loading groceries in his van. Based on these activities, and the opinions of Drs. Goss and Carlson, Employer argues that Claimant is physically capable of working.

Employer therefore asserts that if Claimant reasonably looked for work, he would be gainfully employed in a sedentary or moderate duty position. Claimant argues that he is totally disabled. In order to determine whether Claimant can in fact perform any of the jobs presented by the Employer, the undersigned must determine what physician's opinion is most credible.

The judge is not required to accept the opinion or theory of a medical expert that contradicts the findings of the adjudicator which are based on common sense. Avondale Indus., Inc. v. Director, OWCP, 977 F.2d 186 (5th Cir. 1992). It is within the ALJ's discretion to give more weight to the opinion of a doctor who was able to provide an explanation for the claimant's pain than to a doctor who could offer several possible theoretical reasons but could not relate the possible causes specifically to the claimant and did not have an independent recollection of her. Cotton v. Army & Air Force Exchange Services, 34 BRBS 88 (2000).

The opinion of a treating physician that a claimant is unable to work at his former job is entitled to greater weight than the opinion of a non-treating physician. Downs v. Director, OWCP, 152 F.3d 924, (9th Cir. 1998) (July 10, 1998); see also Magallanes v. Bowen, 881 F.2d

747 (9th Cir. 1989)(Health and Human Services administrative law decision); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(Social Security administrative law decision). It is solely within the judge's discretion to accept or reject all or any part of any testimony, according to his or her judgment. Perini Corp. v. Hyde, 306 F. Supp. 1321, 1327 (D.R.I. 1969).

Claimant's treating physician has consistently asserted that Claimant cannot work and is totally disabled. Dr. Mathews has been Claimant's treating physician since August of 1995 and has seen Claimant's condition deteriorate. Throughout Claimant's four surgeries, Dr. Mathews has been treating Claimant, it is clear that he believes that Claimant's complaints of pain and tingling are credible. Dr. Goss met with Claimant, examined him, and reported that he was incapable of working. Dr. Carlson examined Claimant on one occasion and determined that he was only capable of performing sedentary or sedentary-light work. Following the review of the surveillance video, both Drs. Goss and Carlson stated that Claimant could perform moderate duty work.

Dr. Mathews states that Claimant cannot work and is totally disabled, although it is clear from the surveillance video that Claimant has a limited ability to walk, sit, and lift very light items. He is consistently on pain medications, and therefore has a very limited ability to drive. (Tr. 29). Upon reviewing Drs. Goss and Carlson's recommendations that Claimant can perform either sedentary or moderate duty work, the undersigned finds that moderate duty work would be far too strenuous based on Claimant's own testimony and his treating physician's medical reports. However, I find that despite Dr. Mathews' assertions that he is totally disabled, and taking into consideration the opinions of Drs. Goss and Carlson, Claimant is capable of performing a part time sedentary position that consists of 15 to 20 hours a week, lifting no more that ten pounds, and where he would be accommodated to sit, stand and walk as needed. In addition, the position would have to take into consideration Claimant's use of pain medication. Therefore, because such pain medication causes Claimant to lose concentration, a position that requires concentration or mathematical calculation would be inappropriate. In addition, I find that Claimant does have restrictions on his driving abilities, given his physical condition, and should limit his driving to no more than 30 minutes a trip.

b.) Employer's Labor Market Survey

As stated *supra*, the employer must demonstrate that specific job opportunities exist which the injured employee could perform considering the claimant's age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 99 F.2d 1374 (9th Cir. 1993); cert. denied, 511 U.S. 1031 (1994). The Edwards court also stressed the importance of these jobs being regularly available. In addition, the Board and the Fourth Circuit have both held that a showing by an employer of a single job opening is not sufficient to satisfy the employer's burden of suitable alternate employment. The employer must present evidence that a range of jobs exists which is reasonably available and which the disabled claimant is realistically able to secure and perform. Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); Vonthronsohnhaus v. Ingalls Shipbuilding, Inc., 24 BRBS 154 (1990); Hayes v. P & M Crane Co., 23 BRBS 389 (1990), vacated, 24 BRBS 116 (CRT) (5th Cir. 1991); Green v. Suderman

Stevedores, 23 BRBS 322 (1990). Turner specifies that the employer must show jobs which are available within the claimant's "local community." New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977). See Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 16 (CRT) (2d Cir. 1991). "Local community" has been interpreted to mean the community in which the injury occurred, but may include the area where the claimant resided at the time of injury. Jameson v. Marine Terminals, 10 BRBS 194 (1979).

The Board has held, however, that jobs 65 and 200 miles away are not within the geographical area, even if the employee took such jobs before his injury. Kilsby v. Diamond M. Drilling Co., 6 BRBS 114 (1977), aff'd sub nom. Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978).

The first position that Mr. Kay listed for Claimant was with Expediter. As noted above, on cross examination, Mr. Kay admitted that they are not the actual employer. (Tr. 116-17). Mr. Kay testified that Expediter would refer Claimant to another company for employment, and he noted that he did not know where or to what type of company Expediter would refer Claimant, or what Claimant would do. (Tr. 120). I find that listing a company that in turns refers an individual to an unspecified company that is not indicated in the labor market survey does not constitute revealing the precise nature, terms, and availability of the position. Therefore, this position does not constitute suitable alternate employment under the Act.[2]

The second position that was listed by Employer as a customer service position was with Goodwill Industries. In the job analysis, the position noted that lifting would be required up to 20 pounds. (Tr. 124). As noted, Mr. Kay stated that the position could most likely be accommodated, but he had not discussed accommodation with the current manager, and admitted that he did not know if accommodation would be possible. (Tr. 127). In addition, Mr. Kay stated that the position traditionally evolves into a full-time position, which would be inappropriate for Claimant, but he did not know if this position would be full or part time. (Tr. 125-26). Therefore, this position does not fit within Claimant's physical capabilities. In addition, because it is unclear how many hours of work Goodwill would require, Employer has not revealed the precise nature, terms, and availability of the position. Therefore, this position does not constitute suitable alternate employment under the Act.

Mr. Kay also listed two positions as a security guard. These are seasonal positions. Mr. Kay stated that the position would be dependant on tourism in the area, and therefore, he did not know how many hours Claimant would be able to work in a year, as well as how many weeks a year he would be capable of working. (Tr. 128). The undersigned finds that this position is not suitable alternate employment because the precise terms and availability of the position is tenuous and unknown given its seasonal nature.

The third type of position that Mr. Kay stated would be suitable for Claimant was that of a dispatcher. The Digital Security position is not suitable because it would not allow working

[2] Claimant's counsel also cites Hawkins v. Newport News Shipbuilding, BRB No. 01-0597 (April 15, 2002), in which the ALJ found that this position was "sheltered employment," based on the fact that the Employer subsidized the first 500 hours of employment. The Benefits Review Board upheld the ALJ's decision in that case.

less than 30 hours a week, which is too much for Claimant to handle, based on his physical restrictions and his total lack of computer skills and inability to concentrate. The other position is with Associated Cabs in Newport News, Virginia. While the position would be suitable for Claimant given the fact that it allows for part time work and enables Claimant to stand and walk as needed, the position would be more than an hour away from Claimant's home, and would not be within Claimant's geographical or driving restrictions.

The fourth type of job Mr. Kay listed was that of cashier. As stated above, based on Claimant's pain medication and his testimony that he had trouble concentrating, I find that these positions that deal with the calculation and exchange of money would be inappropriate for Claimant.

Mr. Kay's updates to the labor market survey are also inappropriate positions. All of the positions listed in the July 11, 2003 report would require standing at least 4 hours, and all except the position at the Williamsburg Lodge would be 35 to 40 hours a week. In addition, all of the positions require lifting over 10 lbs, except the Pizza Hut and Wal-Mart positions, which require using a cash register. The position at the Williamsburg Lodge is not suitable because the precise terms and availability of the position is tenuous and unknown given its seasonal nature.

Employer has not presented any evidence or arguments proving suitable alternate employment available for Claimant. Employer can meet the burden of proving suitable alternate employment by identifying specific jobs in close proximity to the place which are available for the Claimant. See Royce v. Erich Construction Co., 17 BRBS 157, 158-59 (1985). Since Employer has made no showing of suitable alternate employment, Employer has not rebutted Claimant's *prima facie* case. Therefore, I find that Claimant is temporarily totally disabled.

V. Order

Accordingly, it is hereby ORDERED that:

1) Employer, Newport News Shipbuilding, is hereby ordered to pay Claimant, Michael Lee, temporary total disability at the compensation rate of $561.35 per week, from June 20, 2002 and continuing. Employer shall receive credit for any compensation already paid;

2) Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

3) Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed on the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

4) Within thirty (30) days receipt of this decision and order, Claimant's attorney shall file a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty (20) to respond thereto.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/AM
Newport News, Virginia